IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.346 OF 2005
IN
SECOND APPEAL NO.161 OF 2005

Ramesh Dattatraya Mhatre .. Applicant
Versus
Sanjay Dattaram Mhatre .. Respondent

Mr.M.A.Patil for applicant
Mr.Ambar Joshi i/b S.M.Oak for respondent

CORAM : P.V.KAKADE, J.

DATE : 19TH AUGUST 2005

P.C.:

1. By this application the applicant is seeking stay of the lower court's order dated 17.8.2004 while allowing the appeal and setting aside the judgment and order passed by the trial court thereby plaintiff's suit came to be decreed in respect of right involved in the Well water and consequently for perpetual injunction.

2. I have heard the learned counsel for both the parties. Perused the record.

3. Earlier by order dated 23.3.2005 this court

passed order to the effect that respondent had filed execution proceeding in the lower court and date was fixed for execution proceeding on 29.3.2005, and therefore, till that date decree passed by the appellate court directing the removal of fencing was stayed. Today both the learned counsel for the parties submitted that thereafter no execution proceeding was processed and it has remained stayed.

4. The lower appellate court while allowing the appeal and decreeing the suit of the plaintiff declared that the plaintiff had right to fetch water from the well situated in Survey No.254 for the purpose of cultivating his irrigated land in his share of the property and defendant was restrained from obstructing the plaintiff from fetching water from the well in the share of the defendant in survey No.254 by himself or through any of his authorised agents.

5. The lower appellate court while appreciating the evidence has observed that the evidence on record was sufficient to suggest that the plaintiff had erected electric poles in the land and there were signs of water channel in his land, prior to partition the father of

the plaintiff and defendant was cultivating the trees from the well water situated in survey No.254 itself. On the other hand the defendant was not in a position which was of the well was being used by the plaintiff for fetching the water to his trees and under the circumstances it was held that the plaintiff had right to fetch the water from the well located in survey No.254.

6. In my considered view, the balance of convenience would demand that both the parties would be entitled to fetch water from the suit well and defendant has no right to obstruct the plaintiff to use of the water atleast pending appeal and till the rights of the parties are adjudicated finally on merits. In these circumstances, I do not see any merits in the application and application stands dismissed with no order as to costs.